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10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA

12 SAN JOSE DIVISION

13 CISCO SYSTEMS, INC.,

14 Plaintiff,

15 v.

16 ARISTA NETWORKS, INC.,

17 Defendant.

Case No. 5:14-cv-05344-BLF (PSG)

**DEFENDANT ARISTA NETWORKS,  
INC.'S REPLY IN SUPPORT OF MOTION  
TO STRIKE DECLARATION OF KEVIN  
ALMERO TH**

Claim Construction Hrg: March 18, 2016

1 Cisco's opposition distorts the Patent Local Rules, neglects important facts, and omits any  
 2 explanation for why Cisco failed to timely disclose the opinions of Dr. Almeroth and the evidence  
 3 on which he relied. Accordingly, the Court should strike the Almeroth Declaration.

4 Cisco contends that it satisfied the requirements of Patent Local Rule 4-2(b) on August 24,  
 5 when Cisco disclosed that "it may rely on Almeroth's testimony for 'each disputed term . . . and  
 6 to address the meaning and subject matter of the asserted patent claims as they would be  
 7 understood by those of ordinary skill in the art at the time any patents were filed, to address the  
 8 proper construction of various claim terms in light of the intrinsic and extrinsic evidence and/or  
 9 the meaning of the term to one of ordinary skill in the art, to rebut claim construction positions  
 10 taken by Arista and/or any of its experts, and to otherwise assist the Court in construing the  
 11 asserted claims.'" (Dkt. No. 153, Opp. at 2). In other words, Cisco disclosed that Dr. Almeroth  
 12 might testify about any issue relevant to the construction of any asserted claim term. Such a  
 13 statement does not amount to "a description of *the substance* of [the] witness' proposed  
 14 testimony," as the Patent Local Rules require. *See* P.L.R. 4-2 (emphasis added). Indeed, if such a  
 15 meaningless disclosure satisfied the Patent Local Rule, the Rule would have no purpose or effect,  
 16 and litigants in this District would stop making meaningful disclosures altogether.<sup>1</sup>

17 Cisco also notes that its disclosures in its P.L.R. 4-3 statement—filed nearly one month  
 18 after its P.L.R. 4-2 statement—provided more detail because they identified claim terms about  
 19 which Dr. Almeroth would opine. But even that belated disclosure failed to identify two claim  
 20 terms that Dr. Almeroth ultimately discussed in his declaration, and failed to disclose three pieces  
 21 of extrinsic evidence that Dr. Almeroth cited in his declaration. (*See* Dkt. No. 144 at 2). Cisco  
 22 repeatedly stresses that the extrinsic evidence was "publicly available." (Opp. at 1, 3). But  
 23

24 <sup>1</sup> In support of its interpretation of Patent Local Rule 4-2, Cisco cites a single case: *Reflex*  
 25 *Packaging, Inc. v. Lenovo (U.S.), Inc.*, No. C 10-01002 JW, 2011 WL 7295479 (N.D. Cal. Apr. 7,  
 26 2011). But in *Reflex Packaging*, the court read the local patent rules in light of the moving  
 27 party's similarly sparse disclosure: "The Court finds that both the removal of the 'meaningful  
 28 deposition' language from the Patent Local Rules, *as well as the similarity between Defendant's*  
*disclosure and the disclosure which Defendant contends was insufficient*, support a finding that  
 Plaintiff adequately disclosed the expert testimony it intended to use in the Joint Claim  
 Construction Statement." *Id.* at \*2 (emphasis added). Here, by contrast, only Cisco failed to  
 disclose the substance of a witness's proposed testimony.

1 extrinsic evidence related to claim construction—which, according to P.L.R. 4-2, includes  
 2 “dictionaries” and “treatises”—is usually available to the public. The Patent Local Rules do not  
 3 excuse the withholding of extrinsic evidence just because it could be found among the mass of  
 4 public information.

5 In the end, Cisco’s argument appears to be that the Court should forgive Cisco’s failure to  
 6 comply with the Patent Local Rules because Arista must show that it was prejudiced by Cisco’s  
 7 conduct. Although Cisco’s constructions are no more plausible after considering Dr. Almeroth’s  
 8 testimony, Arista plainly was prejudiced because Cisco developed and submitted new evidence  
 9 after the parties committed to binding claim construction positions, whereas Arista was not free to  
 10 do so. Moreover, Cisco’s contention that “Arista should have proposed practical solutions” (Opp.  
 11 at 3) to cure *Cisco’s* rule violation is unreasonable on its face, and unsupported by any law.  
 12 Cisco’s suggested “practical solution” is for Arista to announce that its current claim construction  
 13 positions are incorrect and to submit new constructions instead. Not only is that suggestion  
 14 implausible, but it also demonstrates the prejudice that is created when one party adheres to the  
 15 Court’s deadlines and the other does not.

16 In any event, the Patent Local Rules do not impose a burden of showing prejudice to  
 17 enforce their deadlines. On the contrary, the Rules establish a schedule for patent-related  
 18 disclosures so that the parties do not have to constantly quibble about what constitutes a timely  
 19 disclosure and what may or may not be prejudicial. If one party is adhering to the rules and the  
 20 other is not, the party that follows the rules—the party that mutually exchanges extrinsic evidence  
 21 on schedule instead of waiting to see what the other party discloses—is prejudiced. *See Largan*  
 22 *Precision Co. v. Fujifilm Corp.*, No. C 10-01318 SBA, 2012 WL 4097719, at \*4 (N.D. Cal. Sept.  
 23 17, 2012) (finding “inherent prejudice” to a defendant because the plaintiff failed to timely  
 24 disclose the opinions of a claim-construction expert).

25 Instead, as the party that violated the Patent Local Rules, Cisco should bear the burden of  
 26 showing that it had good cause for violating them—but Cisco has not even tried to do so.  
 27 Accordingly, the Court should strike the Almeroth Declaration in its entirety or, in the alternative,  
 28 at least as to ¶¶ 41-43, 59-62, and 71-80.

1 Dated: December 28, 2015

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